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No. 83-1980

In the Supreme Court of the United States

OCTOBER TERM, 1983

DEAN EDWARD LILLIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

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Petitioner seeks review of his conviction for willfully failing to file a corporate income tax return for 1977. He makes the following claims: (1) the magistrate's entry of final judgment pursuant to 28 U.S.C. 636(a)(3) and 18 U.S.C. 3401(a)-(b)—to which petitioner consented—violated Article III of the Constitution and the Due Process Clause; (2) the statute proscribing willful failure to file tax returns, 26 U.S.C. 7203, violates the Tenth Amendment because Congress has no express power to enforce its tax laws through criminal sanctions; and (3) the magistrate abused his discretion by denying petitioner's motion to withdraw his plea of guilty.

1. Following an investigation by the Internal Revenue Service, the Department of Justice authorized the United States Attorney for the District of Oregon to prosecute petitioner for willfully failing to file corporate income tax returns for the years 1975, 1976, and 1977, and for willfully

failing to file individual income tax returns for the years 1976 and 1977 (Pet. App. 26, 27-28).

Through counsel, petitioner entered into a plea agreement whereby he agreed to plead guilty to a one-count information charging him with willful failure to file a corporate tax return for 1977 (*id.* at 28-29). In return, the government agreed: (1) not to prosecute petitioner for failing to file other individual or corporate income tax returns for the years 1975 through 1980; (2) not to prosecute any members of petitioner's family for like offenses; and (3) not to issue any press releases concerning proceedings involving the petitioner. On March 11, 1982, petitioner pleaded guilty in accordance with the agreement (*id.* at 29).[1]

On August 20, 1982, however, petitioner moved to withdraw his plea on the ground that he had a defense to the charge to which he had pleaded guilty (*ibid.*).[2] After an evidentiary hearing, the magistrate found that petitioner had not presented a plausible reason for withdrawing his plea (*id.* at 30, 51). Specifically, the magistrate found the following facts: (1) petitioner's defense was based on documents irrelevant to the count to which he had pled guilty; (2) the government had not breached the plea agreement; (3) the government would be prejudiced by withdrawal of petitioner's plea because the statute of limitations had

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[1]Both the district court and the court of appeals found that petitioner's plea of guilty was knowingly and voluntarily made (Pet. App. 23, 29).

[2]Petitioner's "newly discovered" defense was that documents needed to file his 1977 corporate tax return were in the custody of the State of Oregon and consequently were not available to him (Pet. App. 29). The district court found as a fact that petitioner's attorney was aware of this potential defense before petitioner pled guilty (*id.* at 31 n.1); the government, moreover, had several witnesses and documentary evidence to prove that the State had repeatedly tried to get the petitioner to retrieve his records but that he had not done so (*id.* at 31 n.1, 40).

expired on one of the dismissed counts; (4) the government had not coerced petitioner into pleading guilty with threats of prosecution of his family; and (5) there was no evidence that petitioner's attorney acted incompetently or exercised bad judgment (*id.* at 30-31, 38-52).

The magistrate sentenced petitioner to one year's imprisonment and a $10,000 fine. Petitioner successfully requested a stay of his sentence and appealed the magistrate's judgment to the district court under 18 U.S.C. 3402. The district judge affirmed the magistrate (Pet. App. 34-35), as did the court of appeals (*id.* at 21-24).

2. We are advised by the United States Attorney for the District of Oregon that petitioner became a fugitive from justice on April 10, 1984, when he failed to appear before the district court for a determination of his commitment date. On that day the district court issued a bench warrant for the petitioner's arrest; on June 1, 1984, petitioner was indicted for failing to appear before a court in violation of 18 U.S.C. 3150. Because petitioner remains a fugitive from justice, he is "disentitle[d] * * * [from] call[ing] upon the resources of the Court for determination of his claims." *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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